(2)

Supreme Court, U.S.
FILED
OCT 9 1996
CLERK

No. 96-394

In The

Supreme Court of the United States

October Term, 1996

ROGER PICKETT,

Petitioner,

vs.

THE CITY OF WARR ACRES, KEITH GREENWOOD, BOB CUNNINGHAM, JOHN HENSLEY, AND JEFF PARSONS,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

RESPONDENTS' OBJECTION TO PETITION FOR WRIT OF CERTIORARI

HUCKABY, FLEMING, FRAILEY, CHAFFIN, CORDELL, GREENWOOD & PERRYMAN

KENT FLEMING, OBA# 2976
BRENTLY C. OLSSON, OBA# 12807
1215 Classen Drive
P. O. Box 60130
Oklahoma City, OK 73146
(405) 235-6648

Attorneys for Respondents

October 9, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1+1 pp

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the Oklahoma Supreme Court, Oklahoma Court of Appeals and the District Court for Oklahoma County, State of Oklahoma.

TABLE OF CONTENTS

Page

Table of Authorities iii

Concise Statement of the Case 1

Summary of Legal Arguments 3

Legal Arguments and Authority in Objection to the Writ for Certiorari 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES CITED:

Supreme Court

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938) 4

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 7, 8

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 6

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1151, 47 L.Ed.2d 405 (1976) 5

Penbaur v. City of St. Louis, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 5

Pratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1980) 5

Circuit Court

Alan v. Denver Public School Bd., 928 F.2d 978 (10th Cir. 1991) 6

Conaway v. Smith, 853 F.2d 789 (10th Cir. 1984) 6

Garinois v. Newton, 827 F.2d 306 (10th Cir. 1987) 7

Karr v. Smith, 774 F.2d 1029 (5th Cir. 1991) 7

Sullivan v. Stark, 808 F.2d 737 (10th Cir. 1987) 6

TABLE OF AUTHORITIES – Continued

Page

Summers v. State of Utah, 927 F.2d 1165 (10th Cir. 1991) 7

Thompson v. City of Lawrence, 58 F.3d 1511 (10th Cir. 1995) 7, 8

OTHER AUTHORITIES:

Title 12 O.S. §196 8

Title 21 O.S. §540 8

Title 21 O.S. §650.4 8

CONCISE STATEMENT OF THE CASE

On the afternoon of August 27, 1991, J.C. Kimbro came to the "Stress Clinic" to be treated by Petitioner Dr. Roger Pickett for pain management. While Mr. Kimbro was seated in the waiting room, he passed out and became unconscious. The secretary for the Petitioner, at the doctor's behest, made a "911" call. In response, Respondent City of Warr Acres dispatched an "EMT" (Emergency Medical Technician) team made up of firemen to the Stress Clinic. The respondent firemen who were dispatched were Bob Cunningham, John Hensley and Jeff Parsons. When they arrived, they observed a man dressed in a white button-down shirt and slacks performing CPR and mouth-to-mouth resuscitation on Mr. Kimbro. The man was later learned to be the Petitioner, Roger Pickett. Police Officer Keith Greenwood also accompanied the team.

The firemen/EMTs proceeded to hook up a defibrillator to Mr. Kimbro. EMT David Bryant told Petitioner Pickett to cease performing CPR and to "back away" from the heart attack victim. As the Oklahoma Court of Appeals (attached as Appendix "B" to the Petition for Writ of Certiorari) observed, there was no controversy that a defibrillator shock posed a danger of arcing to persons in close proximity to a heart attack victim at the time the shock was administered. There was no dispute that the person operating the defibrillator had the discretion to direct how far back people working around the patient should be.

The Petitioner Pickett did not move, and insisted that he was far enough back from the heart attack victim.

Upon being asked to move again, the Petitioner responded angrily and did not move. The testimony from the firemen indicated that the Petitioner reacted by hitting EMT, David Bryan.

Oklahoma law makes it a misdemeanor offense for anyone without justifiable excuse or cause to commit an assault or battery upon an emergency medical technician. Officer Greenwood, believing that a misdemeanor had been committed in his presence by the Petitioner doctor and to protect the Petitioner from the danger of an electric arc thus ending the delay in administering the life saving defibrillation, grabbed the Petitioner and had to subdue him. The Petitioner was upset by this action and struggled to resist Officer Greenwood's hold. The officer restrained the Petitioner until he calmed down. Upon being released from the officer's grasp, the doctor did return to attending the heart attack victim, who was ultimately revived by the defibrillator treatment and eventually transported by the ambulance to the hospital.

In the official police report concerning the actions of the Petitioner, one of the firemen gave an opinion that the Petitioner became a "violent quack." Petitioner said in his deposition that his medical practice was not effected by this incident or the "quack" opinion.

The trial court, the Oklahoma Court of Appeals and the Oklahoma Supreme Court, after reviewing the record submitted, found there was no dispute of material facts and the Respondents were entitled to summary judgment on all claims, including the Petitioner's constitutional claims.

SUMMARY OF LEGAL ARGUMENT

A review of the Petitioner's Petition for Writ of Certiorari reveals the alleged error is that the Oklahoma Supreme Court erroneously found that the facts submitted in the record were not in dispute and misapplied the properly stated rules of law. According to Rule 10(c) of the Rules of the Supreme Court of the United States, such contentions do not merit granting the Petition for Certiorari. The undisputed facts demonstrated that no final policymaker or policy of the City of the Warr Acres was the moving force behind the alleged constitutional deprivation alleged by Petitioner. Petitioner presented no evidence in the record that his business was harmed as a result of the incident in question, thus no liberty deprivation occurred. Finally, the record clearly demonstrated that the firemen and the police acted with objective reasonableness and had probable cause to restrain Petitioner when he refused to move away from the heart attack victim. The Petitioner's arguments baldly conclude that there was disputed material facts in the record. The essence of Petitioner's argument is, in reality, mere disagreement of the law to the undisputed facts. However, three courts determined the record to be of sufficient clarity that the facts were not in dispute as to what occurred and the Respondents were entitled to summary judgment.

LEGAL ARGUMENTS AND AUTHORITY IN OBJECTION TO WRIT OF CERTIORARI

PROPOSITON I

CERTIORARI IS NOT APPROPRIATE TO REVIEW EVIDENCE OR INFERENCES DRAWN FROM IT.

Rule 10(c) states in relevant part: "A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." The United States Supreme Court articulated in *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938) the longstanding rule that it will not grant certiorari merely to review evidence or inferences drawn from it. The substance of the instant Petition for Certiorari falls precisely within the criteria that this Court will not consider on certiorari. The Petitioner has listed three questions presented for review and all three begin with the following: "Whether summary judgment was properly granted . . . ?" In none of the questions presented for review does Petitioner state that the wrong law was applied to this case. When the Petitioner's argument is stripped to its bare essence, it is one of mere disagreement of the application of the law to the undisputed facts. This does not entitle Petitioner to Certiorari.

PROPOSITION II

PETITIONER PRESENTED NO EVIDENCE THAT FINAL POLICY-MAKERS FOR THE CITY OF WARR ACRES APPROVED OR ORDERED PETITIONER TO BE SEIZED OR OFFENDED.

Municipalities may only be liable under 42 USC §1983 for acts where the municipality itself is actually responsible. *Penbaur v. City of St. Louis,* 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). A municipality's policy must be the "moving force" behind the alleged violation; mere negligence is not a basis for liability under §1983. *Pratt v. Taylor,* 451 U.S. 527, 536, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1980). Only those municipal officials which have "policy making authority" may, by their actions, subject the City to §1983 liability. *Penbaur, supra,* at 483, S.Ct. at 1300.

Nothing in the record presented demonstrated that a final policy maker for the City or its policies, were the moving force behind the alleged incident in question. Accordingly, the City of Warr Acres was entitled to judgment as a matter of law.

PROPOSITON III

RESPONDENTS VIOLATED NO CONSTITUTIONALLY PROTECTED INTEREST OF THE PETITIONER.

The critical focus of any liberty interest inquiry must be whether the plaintiff was stigmatized from: (1) the publication of false and damaging information, that not only damages the plaintiff's reputation; (2) but also caused a loss of employment opportunities. *Paul v. Davis,*

424 U.S. 693, 701, 96 S.Ct. 1151, 1160, 47 L.Ed.2d 405 (1976). Characterizations that a person performed his job poorly or is negligent does not rise to a level of a violation of a protected liberty interest. *Sullivan v. Stark*, 808 F.2d 737, 739 (10th Cir. 1987); *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1984). Stigmatization or reputational damage alone, no matter how egregious, is not sufficient to support a §1983 cause of action. *Alan v. Denver Public School Bd.*, 928 F.2d 978 (10th Cir. 1991).

The characterization in the record that Petitioner was a "violent quack" is an opinion which implies, at best, that he was negligent or acted incompetently. Additionally, the Petitioner's own deposition testimony, which was included in the record, indicated that he had no evidence that his business changed or was damaged as a result of the occurrence or the report of the occurrence. Thus, it follows there was no basis for a liberty interest deprivation claim.

PROPOSITION IV

THE FIREMEN/EMT TEAM, BOB CUNNINGHAM, JOHN HENSLEY AND JEFF PARSONS, ARE IMMUNE FROM PLAINTIFF'S SUIT.

The Petitioner never demonstrated that the firemen ever acted in bad faith while performing discretionary acts or that their conduct violated clearly established statutory or constitutional rights which a reasonable person would have known, as required in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Thus the Petitioner's contentions did not lift the firemen's qualified immunity.

PROPOSITION V

OFFICER KEITH GREENWOOD ACTED WITH PROBABLE CAUSE AND OBJECTIVE REASONABLENESS IN REMOVING THE PETITIONER AWAY FROM THE HEART ATTACK VICTIM.

Probable cause arises where the facts and circumstances within an officer's knowledge in which he has reasonable, trustworthy information that is sufficient to warn a prudent man into believing that an offense had been or is being committed. *Karr v. Smith,* 774 F.2d 1029 (5th Cir. 1985). The validity of arrest is not undermined by subsequent events of a suspect's criminal prosecution or dismissal of charges. *Summers v. State of Utah,* 927 F.2d 1165, 1166 (10th Cir. 1991). Probable cause to arrest does not depend on whether the suspect actually committed a crime. *Garinois v. Newton,* 827 F.2d 306, 309 (10th Cir. 1987).

In the excessive force context, qualified immunity standard is an objective reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). *Thompson v. City of Lawrence,* 58 F.3d 1511, 1516 (10th Cir. 1995). The "reasonableness" of a particular use of force must be judged from the prospective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. *Graham, supra,* S. Ct. at 1872. A calculus of reasonableness must embody allowance for the fact that officers are often forced to make split second judgments in circumstances that are tense and uncertain and rapidly enveloping, when evaluating the amount of force that is necessary for a particular situation. It is well established that the right to arrest an individual or detain them,

carries the right to use some physical coercion. *Graham, supra; Thompson, supra.*

Pursuant to Title 12 O.S. §196, the State of Oklahoma allows a police officer to make a warrantless arrest of a person "for public offense committed or attempted in his presence." Additionally, Title 21 O.S. §540 makes it a crime for "every person who wilfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office . . . " Finally, Title 21 O.S. §650.4, makes it misdemeanor for "anyone who without justifiable or excusable cause and with the attempt to do bodily harm, commits any assault, battery or assault and battery upon the person of an emergency medical technician or other emergency medical healthcare provider." The record indicated that the EMTs, as well as Officer Greenwood, saw the Petitioner batter EMT, David Bryant.

An additional cause for Officer Greenwood's physical removal of the Petitioner was the fact that the heart attack victim would die without the lifesaving defibrillation, and the Petitioner himself could be shocked by an electric arc. These compelling facts gave Officer Greenwood the right to physically remove the Petitioner from the immediate area of the heart attack victim.

Accordingly, there was no evidence in the record to lift Officer Keith Greenwood's immunity from suit as he acted with probable cause to detain the Petitioner and to save the heart attack victim from any delay in defibrillation, additionally protecting the Petitioner from the danger from electric shock arcing from the defibrillator. The undisputed facts are abundantly clear that Greenwood

acted with objective reasonableness and thus was entitled to summary judgment.

CONCLUSION

WHEREFORE, above premises considered, the Respondents, City of Warr Acres, Officer Keith Greenwood and Firemen Bob Cunningham, John Hensley and Jeff Parsons pray the Court deny the Petitioner's Petition for Writ of certiorari.

Respectfully submitted,

HUCKABY, FLEMING, FRAILEY, CHAFFIN, CORDELL, GREENWOOD & PERRYMAN
KENT FLEMING, OBA #2976
BRENTLY C. OLSSON, OBA #12807
1215 Classen Drive
P. O. Box 60130
Oklahoma City, OK 73146
(405) 235-6648

Attorneys for Respondents